Development & Commercial Bank Ltd v Dinesh Kumar a/l Jashbhai Nagjibhai & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-1082 OF 1993
ABDUL AZIZ J
8 MARCH 2002

Civil Procedure *— Judgments and order — Application for setting aside — Judgment not served on the defendant — Defendant became aware of judgment when bankruptcy notice was served on him — Whether the requirement that the application to set aside the judgment 'within 30 days after the receipt of the judgment or order by him' in O 42 r 13 of the Rules of the High Court 1980 was applicable — Whether defendant had to serve application to set aside within 30 days after he became aware of the judgment — Whether plaintiff could rely on O 42 r 13 to shut out a defendant*

This was the first defendant's appeal against the dismissal by the senior assistant registrar ('the SAR') of his application to set aside the judgment in default that had been entered against him. The application was dismissed by the SAR on the basis that the first defendant had not complied with O 42 r 13 of the Rules of the High Court 1980 ('the RHC') whereby the first defendant was required to serve his application 'within 30 days after the receipt of the judgment or order by him'. The judgment in default was not served on the first defendant and he came to know of the judgment when a bankruptcy notice was served on him. According to the plaintiff, the first defendant had failed to enter appearance and under O 62 r 10 of the RHC, there was no necessity to serve the judgment on him. The judgment was for the sum of RM7,085,953.96 and interest was awarded 'at the rate of 12.5%pa with monthly rests from 1 July 1993 until the date settlement'.

Held, dismissing the first defendant's appeal:

(1) If a plaintiff intends to use the rule in O 42 r 13 of the RHC to shut out a defendant, the plaintiff must serve the judgment on the defendant, otherwise the rule would not operate against the defendant. Hence, there was no justification to read 'within 30 days after the receipt of the judgment or order by him' in O 42 r 13 of the RHC as meaning 30 days after the defendant became aware of the judgment (see p 433A–B).

(2) The prescribed rate of interest was 3%pa above the base lending rate ('BLR'). The BLR at the date of the plaintiff's demand was 8.5%. The prescribed rate was therefore 11.5%. As the plaintiff was entitled to be paid additional interest of 1% as damages for default, the total interest chargeable by the plaintiff was 12.5%. Therefore, it was not true that the judgment was not clear as to the amount of interest as contended by the first defendant. Accordingly, the judgment was regular (see pp 433I–434C, 435E).

(3) As the first defendant had succeeded on the point on which the SAR had dismissed his application, the order for costs made against him by the SAR was set aside (see p 435E).

[Bahasa Malaysia summary

Ini adalah rayuan defendan pertama terhadap penolakan permohonannya untuk mengenepikan penghakiman ingkar yang telah dimasukkan terhadapnya oleh penolong kanan pendaftar ('PKP'). Permohonan tersebut ditolak oleh PKP kerana berasaskan defendan pertama tidak mematuhi dengan A 42 k 13 Kaedah Mahkamah Tinggi 1980 ('KMT') di mana defendan pertama diperlukan untuk menyerahkan permohonannnya 'dalam tempoh masa tiga puluh hari selepas menerima penghakiman ataupun perintah olehnya'. Penghakiman ingkar tidak pernah diserahkan ke atas defendan pertama dan dia hanya tahu mengenai penghakiman tersebut apabila notis kebankrapan diserahkan ke atasnya. Menurut plaintif. Defendan pertama telah gagal memasukkan kehadiran maka di bawah A 62 k 10 KMT, tiadalah perluan untuk menyerahkan penghakiman terhadapnya. Penghakiman adalah bagi jumlah RM7,085,953.96 dan dan faedah yang ditawarkan 'pada kadar 12.5% setahun di kira berbulan mulai 1 Julai 1993 sehingga tarikh penyelesaian'.

Diputuskan, menolak rayuan defendan pertama:

(1) Jika seorang plaintif ingin untuk menggunakan peruntukan dalam A 42 k 13 KMT untuk menyingkirkan defendan, plaintif tersebut perlu menyerahkan penghakiman ke atas defendan, jika tidak peruntukan ini tidak berkuatkuasa terhadap defendan. Oleh itu, tiada sebarang justifikasi untuk mengatakan 'dalam tempoh masa tiga puluh hari selepas penerimaan penghakiman atau perintah olehnya' dalam A 42 k 13 KMT bermaksud dalam tempoh masa tiga puluh hari selepas defendan sedar tentang penghakiman (lihat ms 433A–B).

(2) adar faedah yang disyorkan ia itu 3% setahun lebih daripada kadar pinjaman dasar ('BLR'). BLR pada tarikh tuntutan plaintif dibuat adalah 8.5%. Maka kadar yang disyorkan adalah 11.5%. Kerana plaintif layak untuk mendapat tambahan kadar faedah 1% sebagai pampasan bagi ingkar, jumlah keseluruhan faedah dapat dicajkan oleh plaintif adalah pada kadar 12.5%. Oleh itu, tidak benar bahawa penghakiman tidak jelas mengenai jumlah faedah yang dikenakan sepertimana didakwa oleh defendan pertama. Seterusnya, penghakiman adalah seragam (lihat ms 433I–434C, 435E).

(3) Memandangkan defendan pertama telah berjaya dalam isu di mana PKP telah membatalkan permohonannya, perintah untuk kos yang dibuat terhdapnya oleh PKP telah diketepikan. (lihat ms 435E).]

Notes

For cases on application for setting aside, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3446–3454.

Cases referred to

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (distd)

Legislation referred to

Rules of the High Court 1980 O 6 r 6(3), O 32 r 13(2)(b), O 42 r 13, O 62 r 10

DP Naban (*Vicky Wong* with him) (*Lee Hishammuddin*) for the plaintiffs.
Abd Fareed Abd Gafoor (*VM Mohan, Fareed & Co*) for the first defendant.

Abdul Aziz J: This is the first defendant's appeal against the dismissal by the learned senior assistant registrar of his application to set aside the judgment in default that had been entered against him in this action. The application was dismissed because the senior assistant registrar found that the first defendant had not complied with O 42 r 13 of the Rules of the High Court 1980 ('the RHC'), which rule was introduced in 1993. It requires a party intending to set aside or vary an order or judgment to make and serve his application 'within 30 days after the receipt of the order or judgment by him'.

The judgment in default was given on 30 December 1993. It was not served on the first defendant, but he came to know of it when a bankruptcy notice was served on him on 17 November 1994. He first filed his striking-out application or 20 November 1995. By consent, that was withdrawn. He filed another on 23 July 1996, which was the one that was dismissed.

Relying on O 42 r 13 of the RHC to shut out the first defendant's striking out application, learned counsel for the plaintiffs argued that the judgment was not served on the first defendant because, the first defendant having failed to enter appearance, according to O 62 r 10 of the RHC, the judgment 'need not be served on [him]', and since the plaintiffs were not obliged to serve the judgment on him, O 42 r 13 of the RHC ought to be construed so that the 30 days began to run from the time he came to know of the judgment.

That argument did not propose that what O 42 r 13 means by 'receipt of the order or judgment by him' is otherwise than receipt by the person concerned of the document that is called the judgment, which therefore would have to be served on the person, but what was argued was that the rule should be construed, not according to what it actually says, but so as to make it compatible with the fact that according to O 62 r 10 of the RHC, the judgment need not be served.

I think the actual meaning of the rule is not incompatible with the fact that the judgment need not be served, because the judgment may still be served, and if a plaintiff intends to use the rule to shut out a defendant, then he must serve the judgment, otherwise the rule will not even begin to operate because time will not even have begun to run against the defendant. There is no justification to read 'within 30 days after the receipt of the judgment or order by him' as meaning within 30 days after he becomes aware of the judgment or order.

The application should therefore not have been dismissed on that ground.

Objection was taken against the use by the plaintiffs of an affidavit that was in reply to the first defendant's earlier striking-out application that the plaintiffs sought to use in reply to the first defendant's current application by a notice of intention to use the affidavit. The reason for the objection was because the notice of intention was served beyond the period allowed by O 32 r 13(2)(b) of the RHC for serving an affidavit in reply. I do not intend to rule on this objection because this appeal can be disposed of without resort to that affidavit.

Learned counsel for the first defendant argued that the first defendant was not bound to respond to the writ and statement of claim because the writ and statement of claim that were served on him was a photostat copy which, although signed by the deputy registrar, was not sealed. Reliance was placed primarily on O 6 r 6(3) of the RHC. The trouble with this point is that it was not raised in affidavit so that the facts are not capable of being ascertained. Moreover, the court does not have sight of the actual writ and statement of claim that were served on the first defendant. The copy of the writ in the court file is certainly signed and sealed. Even if what was served was a photostat copy and not sealed, but was signed by the deputy registrar, no authority has been cited that clearly establishes that there has been no service or the service is a nullity. I refrain from so ruling.

I now come to the only complaint raised by the first defendant in his affidavit in support of his application. He has not attempted to show that he has anything else to raise by way of defence.

The judgment was in the sum of RM7,085,953.96. According to the statement of claim (para 5), the first defendant was indebted in that sum as at 30 June 1993, together with further interest accruing thereon at the rate of 12.5%pa from 1 July 1993 until the date of payment. According to para 6, on 6 July 1993 the plaintiffs, through their solicitors, demanded payment of the moneys outstanding. Learned counsel for the plaintiffs in his submission said that the first defendant was warned that if payment was not made within seven days, interest on that sum would be charged at the rate of 12.5%pa. Although that is not in evidence, it must have been so, because that would have been the usual practice. The first defendant failed to pay and the plaintiffs filed this action.

The prescribed rate of interest is 3%pa plus the base lending rate ('the BLR'). According to evidence furnished by the first defendant himself, the BLR on 1 July 1993 was 8.5% and that continued until the end of July when

it went down to 8.4%. It is clear, therefore, that on 1 or 6 July 1993, and on 13 July 1993, the end of the seven days given by the letter of demand of 6 July 1993, the prescribed rate was 11.5%. On top of that, the plaintiffs were entitled by s 3.09 of the loan agreement to an extra 1% interest above the prescribed rate as damages for default. So the interest chargeable then was 12.5%.

The judgment gave interest 'pada kadar 12.5% setahun dengan kadar rehat bulanan dari 1hb Julai 1993 sehingga tarikh penyelesaian'. I may mention now that it is not true, as contended by learned counsel for the first defendant when he compared that manner of stating the rate of interest to what obtained in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, that the judgment is not clear as to the amount of interest. The judgment in this case does not suffer from the problem with the judgment in that case.

The complaint of the first defendant, as advanced in submission, is that even granting that the further interest of 1% is chargeable (which his counsel, incorrectly, said was not provided for) the rate of interest from judgment until settlement should be 11.85% and not 12.5% — a difference of 0.65% — because the BLR at the date of judgment was 7.85%. The complaint is based on that part at the end of the lengthy s 3.10 of the loan agreement which provides that 'in the event that a judgment is obtained ... wherein it is adjudged that any sum of money be paid to the Bank, interest shall be payable on such sum of money ... at the prescribed rate from the date of such judgment until the date of full payment ...'. Learned counsel for the first defendant submitted that based on that section, the judgment should at least declare that interest be at the rate of 12.5% from 1 July 1993 until the date of judgment and at the rate of 11.85% from the date of judgment until settlement, meaning that if the judgment had been in those terms as regards interest, it would have been proper.

Obviously, the first defendant's counsel construed that provision in s 3.10 to mean that interest for the period from judgment until settlement should be at the prescribed rate as at the date of the judgment.

The reply of the plaintiffs' counsel was not directed to a construal of the provision. He said that because the notice of demand warned that interest would be charged at 12.5% if payment was not effected within seven days, and because the first defendant ignored the notice, the plaintiffs had a discretion to impose the rate of interest that was notified. He further submitted that the plaintiffs were entitled at the date of the default to interest at 12.5%, so there was no question of the judgment being in excess of the plaintiffs' entitlement. He further said that 'it was essential to fix the rate prevailing at the date the loan facility was recalled to alleviate the uncertainty which might exist due to fluctuating base lending rates'. See para 3.2.5 of the plaintiffs' written submission.

I think that if the question were to be decided on a proper construction of that provision in s 3.10, the result will not be as suggested by the first defendant's counsel. The provision says that 'interest shall be payable ... at the prescribed rate from the date of such judgment until the date of full

payment'. Using exactly the same words, it could be put in another way: 'From the date of such judgment until the date of full payment interest shall be payable ... at the prescribed rate'. It does not say that the prescribed rate for the period is that at the date of the judgment. The prescribed rate for the period is not qualified in any way. Even for the period, it must be as defined in s 2.01 read with s 3.05 of the loan agreement, that is according as the BLR may fluctuate during the period, in other words, the effect of that provision in s 3.10 is that for the period from judgment until settlement, the same treatment is to be given as regards interest as for the period before judgment. Therefore, going by a proper construction of the provision, both the plaintiffs and the first defendant are wrong in their respective stands, and the judgment should order interest from judgment at the prescribed rate as defined, but that might render the judgment liable to be set aside on the basis of *Tuan Haji Ahmed Abdul Rahman.* So the safe thing to do is to take the pragmatic approach of abandoning the proper construction of the provision and applying for the period the prescribed rate as at a particular date. There appear to be only two dates, the date of the recall of the loan (letter of demand), as employed by the plaintiffs, and the date of judgment, as contended by the first defendant. And I think that, viewing the matter indifferently as a matter of justice to borrowers at large, either date would be alright because in a particular case the BLR might be lower on the one date than on the other and in another case it might be the other way round. The first defendant in this case would not choose the date of judgment if the BLR on that date was higher than on 1 July 1993.

For those reasons, I rule that the judgment is regular and dismiss the appeal with costs for the plaintiffs, but as the first defendant succeeds on the point on which the learned senior assistant registrar dismissed his application I set aside the order for costs made against him by the senior assistant registrar.

First defendant's appeal dismissed.

Reported by Lim Lee Na